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UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA-WESTERN DIVISION

GABRIEL GARCIA, ) Case No. CV 14-00092-AS  
Plaintiff, )  
v. )  
CAROLYN W. COLVIN, )  
Acting Commissioner of the )  
Social Security Administration, )  
Defendant. )  
\_\_\_\_\_ )

MEMORANDUM OPINION

PROCEEDINGS

On January 8, 2014, Plaintiff filed a Complaint seeking review of the denial of his application for a period of disability and Disability Insurance Benefits under Title II of the Social Security Act. (Docket Entry No. 3). The parties have consented to proceed before the undersigned United States Magistrate Judge. (Docket Entry Nos. 9-10). On May 30, 2014, Defendant filed an Answer along with the

1 Administrative Record ("AR"). (Docket Entry Nos. 13-14). The parties  
2 filed a Joint Stipulation ("Joint Stip.") on October 21, 2014, setting  
3 forth their respective positions regarding Plaintiff's claims. (Docket  
4 Entry No. 20).

5 The Court has taken this matter under submission without oral  
6 argument. See C.D. Cal. L.R. 7-15; "Order Re: Procedures In Social  
7 Security Case," filed January 10, 2014 (Docket Entry No. 7).

8  
9 **BACKGROUND AND SUMMARY OF ADMINISTRATIVE DECISION**

10  
11 On February 16, 2010, Plaintiff, formerly employed as a route sales  
12 representative for a bottled water company, filed an application for  
13 Disability Insurance Benefits, alleging disability for a closed period  
14 from September 9, 2009 (the alleged onset of disability sustained from  
15 an injury to his lower back), to April 15, 2011, the date that Plaintiff  
16 returned to work. (AR 34, 40, 48). On March 13, 2012, the  
17 Administrative Law Judge ("ALJ"), Joel B. Martinez, conducted a hearing  
18 and heard testimony from Plaintiff and vocational expert ("VE") Rheta  
19 Baron-King. (AR 12-30). On April 23, 2012, the ALJ issued a decision  
20 denying Plaintiff's application. The ALJ determined that Plaintiff had  
21 the following severe impairments: lower back arthritis, left knee  
22 arthritis, and adjustment disorder with depressed mood and anxiety. (AR  
23 18). However, the ALJ found that Plaintiff was not disabled within the  
24 meaning of the Social Security Act. Id.

25 On May 9, 2012, Plaintiff requested that the Appeals Council review  
26 the ALJ's decision. (AR 7). The request was denied on November 4,  
27 2013. (AR 1-6). The ALJ's decision then became the final decision of  
28 the Commissioner, allowing this Court to review the decision. See 42  
U.S.C. §§ 405(g), 1383(c).



1 the pain or other symptoms alleged.'" Bunnell v. Sullivan, 947 F.2d  
2 341, 344 (9th Cir. 1991) (quoting 42 U.S.C. § 423(d)(5)(A)(1988)). In  
3 producing evidence of the underlying impairment, "[t]he claimant need  
4 not produce objective medical evidence of the pain or fatigue itself, or  
5 the severity thereof." Smolen v. Chater, 80 F.3d 1273, 1282 (9th Cir.  
6 1996).

7  
8 Second, once the claimant has produced the requisite objective  
9 medical evidence, the "ALJ may reject the claimant's testimony regarding  
10 the severity of her symptoms." Smolen, 80 F.3d at 1284. Absent  
11 affirmative evidence of malingering, however, the ALJ may only reject a  
12 plaintiff's testimony "by offering specific, clear and convincing  
13 reasons for doing so." Id. In assessing a claimant's alleged symptoms,  
14 an ALJ may consider: "(1) ordinary techniques of credibility evaluation,  
15 such as claimant's reputation for lying, prior inconsistent statements  
16 concerning the symptoms, and other testimony by the claimant that  
17 appears to be less than candid; (2) unexplained or inadequately  
18 explained failure to seek treatment or to follow a prescribed course of  
19 treatment; and (3) the claimant's daily activities." Id. An ALJ may  
20 also consider "the claimant's work record and observations of treating  
21 and examining physicians and other third parties." Id.

22  
23 Here, the ALJ found that Plaintiff's impairments "could reasonably  
24 be expected to cause the alleged symptoms" but did not find Plaintiff's  
25 "statements concerning the intensity, persistence and limiting effects  
26 of these symptoms" credible to the extent they are inconsistent with the  
27 ALJ's Residual Functional Capacity (RFC) determination that Plaintiff  
28 was capable of medium work. (AR 24). The ALJ discounted Plaintiff's  
credibility because: (1) Plaintiff's testimony revealed physical and

1 mental limitations that were greater than those allowed for a RFC of  
2 medium work; (2) Plaintiff found new full-time employment and has been  
3 employed since April 2011; (3) Plaintiff's treatment did not amount to  
4 a frequency or intensity that is consistent with his alleged  
5 impairments; (4) the third party function report provided by Plaintiff's  
6 mother did not provide a basis for altering the RFC; and (5) Plaintiff's  
7 daily activities are not consistent with the alleged degree of  
8 impairment.

9  
10 The Court agrees with Plaintiff that some of the ALJ's reasons for  
11 discrediting Plaintiff's testimony were not clear and convincing,  
12 particularly where the ALJ relied on testimony and evidence that was not  
13 relevant to the dates for which Plaintiff was seeking benefits, i.e.,  
14 the period between September 9, 2009 and April 15, 2011. For example,  
15 the ALJ asserted that Plaintiff was not credible because at the oral  
16 hearing on March 13, 2012, he testified to abilities that were  
17 consistent with or exceeded his RFC. (AR 24). However, the ALJ only  
18 asked Plaintiff about his *present* abilities, stating, "Are you able to  
19 walk now?" (AR 51 (emphasis added)). Therefore, Plaintiff's responses  
20 were not relevant to his functional limitations during the closed  
21 period.

22  
23 The ALJ also failed to provide clear and convincing reasons for  
24 discounting Plaintiff's testimony by relying on the fact that Plaintiff  
25 had returned to work in April 2011 after his physician determined, in  
26 January 2011, that he could return to work.<sup>1</sup> (AR 48). While employment

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27  
28 <sup>1</sup> Defendant's reliance on Bray v. Astrue, 554 F.3d 1219, 1227 (9th  
Cir. 2009) to support the ALJ's decision is misplaced because the  
plaintiff in Bray sought ongoing benefits, id. at 1221, unlike the

(continued...)

1 during a period of claimed disability may be probative of a claimant's  
2 ability to work, re-entry into the work force *following* a period of  
3 alleged disability does not serve as evidence against claimant. See  
4 Moore v. Comm'r of Soc. Sec. Admin., 278 F.3d 920, 924-25 (9th Cir.  
5 2002)(claimant's "ability to obtain and hold [a] job does not form an  
6 adequate reason for rejecting his testimony or that of his examining  
7 physicians that he was not able to work earlier"); see also Kreishner v.  
8 Colvin, No. 2:12-CV-0530 DAD, 2013 WL 4780548, at \*1 (E.D. Cal. Sept. 5,  
9 2013)("work after the period for which an applicant is seeking  
10 disability...is not a specific and legitimate reason for rejecting...the  
11 medically supported testimony of an applicant, unless the work in  
12 question is wholly inconsistent with the claimed disability.").

13  
14 The ALJ's reliance on Plaintiff's failure to have surgery,  
15 injections, or physical therapy for his ailments or to continue mental  
16 health treatment into 2011 to discount Plaintiff's credibility was also  
17 not a clear and convincing reason. See Parra v. Astrue, 481 F.3d 742,  
18 750-51 (9th Cir. 2007) (conservative treatment can diminish a claimant's  
19 credibility regarding the severity of an impairment). Here, the record  
20 reveals that Plaintiff was willing to undergo surgery for his left knee  
21 pursuant to the recommendation of his chiropractor, Dr. Joel Gutierrez,  
22 and cortisone injections for his lumbar spine as recommended by his  
23 orthopedic surgeon, Dr. Khalid Ahmed, (AR 274), but was denied  
24 insurance authorization for these procedures. (AR 406). Because a  
25 claimant's inability to pay for treatment is a valid reason for failure  
26 to obtain treatment, the ALJ erred in considering this factor in  
27

28 <sup>1</sup> (...continued)  
instant case in which the Plaintiff is seeking benefits for a closed  
period of time. (AR 34).

1 assessing Plaintiff's credibility. See Gamble v. Chater, 68 F.3d 319,  
2 320-22 (9th Cir. 1995) (failure to obtain treatment, even if the alleged  
3 condition is remediable, is not a sufficient reason to deny benefits  
4 where the claimant suffers from financial hardships) (quoting Gordon v.  
5 Schweiker, 725 F.2d 231, 237 (4th Cir. 1985) ("It flies in the face of  
6 the patent purposes of the Social Security Act to deny benefits to  
7 someone because he is too poor to obtain medical treatment that may help  
8 him.")); see also 20 C.F.R. § 404.1530.

9  
10 The ALJ mistakenly relied on Plaintiff's lack of mental health  
11 treatment in 2011 to discount his credibility. Plaintiff testified that  
12 he "got [mental evaluations] again, some time last year for another few  
13 sessions," meaning that in 2011, a year prior to the hearing, Plaintiff  
14 was undergoing biofeedback therapy sessions. (AR 46). Plaintiff's  
15 Medications Form listed a prescription for Xanax dated January 7, 2011  
16 to be taken for anxiety. (AR 251). The ALJ erred in finding  
17 Plaintiff's treatment conservative because both biofeedback therapy and  
18 Xanax prescriptions are not considered conservative treatment. See  
19 Parra, 481 F.3d at 751 (defining conservative treatment as "treat[ment]  
20 with an over-the-counter pain medication."); cf. Leija v. Colvin, No.  
21 1:13-CV-1575 GSA, 2015 WL 1439933, at \*10 (E.D. Cal. Mar. 27, 2015)  
22 (plaintiff's credibility undermined by the fact that he had not received  
23 treatment commensurate with his complaints, such as, *inter alia*,  
24 biofeedback, acupuncture, and physical therapy).

25  
26 Despite these errors, the Court finds that there is adequate  
27 support for the ALJ's adverse credibility finding. The harmless error  
28 rule applies because "remaining reasoning and ultimate credibility

1 determination[s] were adequately supported by substantial evidence in  
2 the record." See Carmickle v. Comm'r, 533 F.3d 1155, 1162-63 (9th Cir.  
3 2008); see also Robbins, 466 F.3d at 885 (quoting Stout v. Comm'r, 454  
4 F.3d 1050, 1055 (9th Cir. 2006)) (the Court will not reverse the  
5 Commissioner's decision if it is based on harmless error, which exists  
6 only when it is "clear from the record that an ALJ's error was  
7 'inconsequential to the ultimate nondisability determination.'").

8  
9 The ALJ properly determined Plaintiff's RFC based on the objective  
10 medical evidence. See Bayliss v. Barnhart, 427 F.3d 1211, 1217 (9th  
11 Cir. 2005) (finding RFC determination proper where "the ALJ took into  
12 account those limitations for which there was record support that did  
13 not depend on [the claimant's] subjective complaints" lacking  
14 credibility). Plaintiff's medical records for the closed period for  
15 which Plaintiff is seeking benefits indicate that Plaintiff could lift  
16 50 pounds occasionally, 25 pounds frequently, stand and walk for six  
17 hours in an eight hour day and sit for six hours in an eight hour day.  
18 (AR 298). These limitations fit within the RFC of medium work which  
19 "involves lifting no more than 50 pounds at a time with frequent lifting  
20 or carrying of objects weighing up to 25 pounds." 20 C.F.R. § 404.1567.

21  
22 The ALJ's finding that Plaintiff's activities of daily living were  
23 not consistent with the alleged degree of impairment was an acceptable  
24 reason for discrediting Plaintiff's testimony and is fully supported by  
25 the record. (AR 24). Daily activities that are inconsistent with  
26 alleged symptoms are a relevant credibility determination. See Rollins  
27 v. Massanari, 261 F.3d 853, 857 (9th Cir. 2001). Plaintiff completed a  
28 Function Report on April 6, 2010 in which he stated that his daily



1 routine consisted of watching television, reading a book, going for  
2 walks, light housework such as dusting and washing dishes, occasionally  
3 preparing meals, shopping, and personal care. (AR 218-25). Thus, the  
4 ALJ properly found that Plaintiff's credibility was undermined because  
5 these "activities suggest that the [plaintiff] has a better physical and  
6 mental capacity than he alleged." (AR 24). See Morgan v. Comm'r of  
7 Soc. Sec. Admin., 169 F.3d 595, 600 (9th Cir. 1999) ("If a claimant is  
8 able to spend a substantial part of his day engaged in pursuits  
9 involving the performance of physical functions that are transferable to  
10 a work setting, a specific finding as to this fact may be sufficient to  
11 discredit a claimant's allegations.").

12  
13 The ALJ also discounted Plaintiff's testimony based upon the third  
14 party report completed by Plaintiff's mother, in which she stated that  
15 Plaintiff assisted with household chores, went for walks, and did some  
16 grocery shopping. (AR 210-17). The ALJ properly found this information  
17 to be consistent with the RFC finding of medium work and inconsistent  
18 with Plaintiff's allegations of disability. See Geris v. Astrue, No. CV  
19 11-09143 OP, 2012 WL 2395652, at \*7 (C.D. Cal. June 22, 2012) (providing  
20 reasons that are germane to the third party's evidence is sufficient to  
21 support an ALJ's credibility finding).

22  
23 Finally, the ALJ also found that Plaintiff's ability to engage in  
24 substantial gainful activity during the closed period of alleged  
25 disability was supported by the record. Dr. Gessesse found that  
26 Plaintiff could do detailed, complex tasks, interact adequately with co-  
27 workers, and handle the daily stressors of employment. (AR 306). Dr.  
28 Sedgh found that Plaintiff could stand and walk for six hours out of an

1 eight hour day, sit for six hours out of an eight hour day, lift and  
2 carry 50 pounds occasionally and 25 pounds frequently. (AR 298).  
3 Although an ALJ may not rely solely on objective findings to discount a  
4 Plaintiff's credibility, the ALJ may consider inconsistencies between  
5 the objective medical evidence and a plaintiff's subjective complaints  
6 as a reason for discounting Plaintiff's credibility. See Morgan v.  
7 Commissioner, 169 F.3d 595, 599-60 (9th Cir. 1999).

8  
9 **ORDER**

10  
11 For the foregoing reasons, the decision of the Commissioner is  
12 affirmed.

13  
14 LET JUDGMENT BE ENTERED ACCORDINGLY.

15  
16 DATED: July 20, 2015

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18 \_\_\_\_\_/s/  
19 ALKA SAGAR  
20 UNITED STATES MAGISTRATE JUDGE  
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